Board of Alien Labor Certification Appeals
United States Department of Labor
Washington, D.C.

DATE: August 19, 1998
CASE NO: 98-INA-015

In the Matter of:

NATIONAL CONFECTIONARY BRANDS, INC.
Employer

On Behalf of:

ATANACIO GONZALEZ-FERNANDEZ
Alien

Appearance: Jose Ramirez, Esq.
Santa Ana, CA
For the Employer and Alien

Before: Holmes, Vittone, and Wood
Administrative Law Judges

JOHN C. HOLMES
Administrative Law Judge

DECISION AND ORDER

The above action arises upon the employer's request for review pursuant to 20 C.F.R. 656.26 (1991) of the denial by the United States Department of Labor Certifying Officer ("CO") of alien labor certification. This application was submitted by employer on behalf of the above-named alien pursuant to §212 (a) (5) of the Immigration and Nationality Act of 1990, 8 U.S.C. § 1182 (a) (5) ("Act"). The certification of aliens for permanent employment is governed by § 212 (a) (5) (A) of the Act, 8 U.S.C. §1182 (a) (5) (A), and Title 20, Part 656 of the Code of Federal Regulations ("CFR"). Unless otherwise noted, all regulations cited in this decision are in Title 20.

Under § 212 (a) (5) of the Act an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and Attorney General that at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work: (1) there are not sufficient workers in the United States

who are able, willing, qualified, and available; and, (2) the employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

We base our decision on the record upon which the CO denied certification and employer's request for review, as contained in the Appeal File,[1] and any written argument of the parties. §656.27 (c).

Statement of the Case

On July 5, 1994, National Confectionary Brands, Inc. ("employer") filed an application for labor certification to enable Atanacio Gonzalez-Fernandez ("alien") to fill the position of Confectionary Cook at an hourly wage of $8.75 (AF 33). The job duties are described as follows:

> Our firm produces and manufactures a variety of quality candy including caramels. In this respect, we are desirous of hiring on a permanent basis, a Confectionary Cooker (Candy), who will be required to control various types of steam cookers (kettles, vats, pressure cookers), to cook various types of candies, according to prescribed formulas. Will weight [sic] and measure various types of ingredients, sugar, corn syrup, adding them to the cooking utensil. Will operate agitators to mix ingredients, adjust steam and set pressure gage and thermostat to cook ingredients at specified temperatures. Will also be required to beat or knead confection to obtain specified consistency as determined by color or batch. Will also add color and other flavoring.
>
> The job requirement is two years of experience as a Confectionary Cook.

On May 29, 1996, the CO issued the Notice of Findings, proposing to deny the labor certification. The CO cited a violation of §656.21 (b) (5) which requires the employer to document that the requirements are the minimum necessary for the performance of the job. The CO found that the alien obtained the required experience while working for the employer. She thus concluded that the employer's stated requirements were not the true minimum requirements. Consequently, the CO instructed the employer to delete the experience requirement and retest the labor market, or document that the alien obtained the required experience or training elsewhere.

In rebuttal, dated June 27, 1996, the employer provided a letter from Mr. Gino Marinelli, former CEO and owner of American Confectionary Corporation, which states that the alien worked as a candy cook for that corporation from May 1990 until the company filed for bankruptcy in September 1992 (AF 24). The employer also submitted a copy its articles of incorporation (AF 25). The employer emphasized that Mr. Michael Schuster is the chief financial officer and Mr. Glen Marinelli is the manager for National Confectionary; whereas Mr. Gino Marinelli was CEO and owner of American Confectionary (AF 19).

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[1] All further references to documents contained in the Appeal File will be noted as "AF."

The CO issued the Final Determination on September 24, 1996, denying certification. The CO found that the ownership of the two candy companies was the same and therefore concluded that the employer failed to document that the alien gained his qualifying experience with a company other than the petitioning employer.

On October 22, 1996, the employer submitted a request for reconsideration which the CO denied on February 19, 1997 (AF 1). Subsequently, the CO forwarded the case to this office for review of Denial of Labor Certification pursuant to §656.26 (b) (1).

Discussion

The issue presented by this appeal is whether the employer specified the actual minimum requirements for the offered position as required by §656.21 (b) (5).

Section 656.21 (b) (5) provides that an employer is required to document that its requirements for the job opportunity are the minimum necessary for the performance of the job, and that the employer has not hired workers with less training -- or that it is not feasible to hire workers with less training or experience -- than that required by the employer's job offer. This section addresses situations where the employer requires more stringent qualifications for a U.S. worker than it requires of the alien. It also prevents the employer from treating an alien more favorably than a U.S. worker. *ERF Inc., d/b/a/ Bayside Motor Inn*, 89-INA-105 (Feb. 14, 1990).

An employer violates §656.21 (b) (5) if it hires the alien with lower qualifications than it specified on the labor certification application, unless the employer demonstrates that it is infeasible to train U.S. workers. *See Capriccio's Restaurant*, 90-INA-480 (Jan. 7, 1992); *Office-Plus, Inc.*, 90-INA-184 (Dec. 19, 1991); *Gerson Industries*, 90-INA-190 (Dec. 19, 1991); *Rosiello Dental Laboratory*, 88-INA-104 (Dec. 22, 1988); *MMMats, Inc*, 87-INA-540 (Nov. 24, 1987). Furthermore, the Board has held that an employer may not require U.S. applicants to have the same type of experience that the alien acquired only while working for the employer in the same job. *Central Harlem Group, Inc.*, 89-INA-284 (May 14, 1991).

In order to prove that the alien gained qualifying experience with a different employer, the employer must demonstrate that its ownership and control are separate and distinct from the company where the alien gained her qualifying experience. *Salad Bowl Restaurant t/a Ayhan Brothers Food, Inc.*, 90-INA-200 (May 23, 1991). Even if the companies are not owned or controlled by the same individuals, the employer may have to show a "distinct operational independence" between the two entities. To determine whether the alien gained his or her experience with the same or a different employer, the circumstances of each case must be examined. The fundamental question is whether the employer is circumventing the fair testing of the U.S. labor market by shifting an alien from employment with one entity to employment with another, thereby providing the alien with the requisite training and experience without providing the same opportunity to U.S. workers. *See Inmos Corp.*, 88-INA-326 (June 1, 1990) (*en banc*)

(alien shifted from foreign entity to related American entity).

In this case, the employer argued that the alien obtained his qualifying experience while working for a company named American Confectionary Corporation, which is distinct from the petitioning employer, National Confectionary Brands (AF 19). The employer provided a letter from Mr. Gino A. Marinelli, CEO and owner of American Confectionary, who attests that the alien worked for his company from May 1990 until September 1992, at which time the company closed and filed for bankruptcy. Although the employer submitted several other items on appeal to the Board, this documentation cannot be considered because our review must be based on the record upon which the CO rendered her decision. *Memorial Granite*, 94-INA-66 (Dec. 23, 1994); *Cappricio's Restaurant*, 90-INA-480 (Jan. 7, 1992).

We find the employer's rebuttal evidence to be insufficient in demonstrating that the alien obtained the qualifying experience with a different employer. As pointed out by the CO, the critical issue is whether the employer proved that ownership and control of the two companies are separate and distinct. The articles of incorporation indicate that the company is authorized to issue 100,000 stocks, but they do not reveal who the stockholders are. Thus, while the employer successfully demonstrated that the officers of the two companies are different, the record is insufficient as to the ownership issue.

Accordingly, we believe the CO reasonably concluded that the employer did not have distinct operational independence from American Confectionary. We also should note that it is probative that the two entities share the same Chino, California business address (AF 24, 26). Based on the foregoing, we find the employer failed to prove that the alien gained the qualifying work experience with a different company. Since the employer did not comply with §656.21 (b) (5) of the regulations, certification cannot be granted and further examination of the record is unnecessary.

ORDER

The Certifying Officer's denial of labor certification is hereby **AFFIRMED**.

For the Panel:

JOHN C. HOLMES
Administrative Law Judges